

Pena Mella (Migration) [2019] AATA 4267 (12 September 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Carlos Alfredo Pena Mella

CASE NUMBER: 1722038

HOME AFFAIRS REFERENCE(S): BCC2016/1777380

MEMBER: Hugh Sanderson

DATE: 12 September 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:

- cl.820.211(2) of Schedule 2 to the Regulations; and
- cl.820.221 of Schedule 2 to the Regulations.

Statement made on 12 September 2019 at 7:47am

1. CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Spouse) – genuine and continuing relationship – joint bank accounts – shared expenses – living together in shared household – evidence of social activities provided – parties represent themselves as married to each other – companionship and emotional support – mutual commitment to shared life to exclusion of all others – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), s 5

Migration Regulations 1994 (Cth), Schedule 2, cls 820.211(2), 820.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration and Border Protection to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
3. The applicant applied for the visa on 18 May 2017 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations).
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211(2)(a) because the delegate was not satisfied the applicant was the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Background

5. The applicant is a citizen of Chile and is currently 28 years old. He first entered Australia on 29 November 2011 holding a Student visa. His student visa ceased in April 2012 and it was not until May 2012 that he applied for a further Student visa. That visa ceased on 11 February 2013 and he did not lodge another application for a further student visa until 13 February 2013. That application was refused by the Department on 27 August 2013. A review of that decision before the Tribunal affirmed the refusal of the application on 19 February 2014. The applicant departed Australia on 17 March 2014.
6. The applicant returned to Australia on a Tourist visa on 25 August 2015, departing on 22 November 2015 and returning on 25 November 2015. He then departed on 19 February 2016 and returned on 23 February 2016. The current application was then filed.
7. The sponsor of the applicant is Elizabeth Corvalan. She was born in Australia and is an Australian citizen. She is currently 25 years old. Her parents are Chilean.
8. The parties claim they first met each other on 21 September 2013, a month after the applicant's Student visa application had been refused, at a Chilean Independence Day celebration in Sydney. It was claimed that a relationship developed and the sponsor travelled to Chile on two occasions to spend time with the applicant. On 22 January 2015 the applicant proposed marriage to the sponsor and, with the consent of both families, she agreed. They were married on 22 January 2016 and commenced living together after that date.
9. Only limited information was provided by the applicant in support of the application when the application was filed. Included with the information was a statement from the applicant's sister, Paula Rodriguez claiming she believed their relationship was genuine.
10. The sponsor's movement records show that since she claimed to have first met the applicant she has travelled overseas as follows:
 - From 2 June 2014 to 13 August 2014 (to Chile);
 - From 10 November 2014 to 3 February 2015 (to Chile);
 - From 22 November 2015 to 25 November 2015 (travelling with the applicant);

- From 19 February 2016 to 23 February 2016 (travelling with the applicant);
 - From 10 September 2017 to 4 October 2017.
11. On 21 November 2016 the sponsor wrote to the Department stating she wished to withdraw her sponsorship of the applicant. In her email, she stated as follows:
12. The reason for my wish to withdrawal is that on the early hours of 20 November 2016 he had assaulted me in his vehicle whilst he was under the influence of marijuana and alcohol which had led to me being taken to Westmead Hospital. I have given a statement to the police and charges will be pressed against him. I currently have an apprehended violence order against him which will be heard in court on 22 November 2016 at Parramatta local Court. This order prevents him from approaching me, contacting me and approaching my home. He has broken this AVO and threatened to kill my family and come to my house and destroy it advised by his brother, Marcelo Andre Pena Mella who also is on a bridging visa. Marcelo has tried to insinuate the idea of us still being married and Carlos being able to reside in Australia in which we declined and he proceeded to act in a threatening and vulgar manner to my family.
13. The sponsor's sister, Paula, wrote to the Department on 26 November 2016 stating she wished to withdraw her statutory declaration in support of the application. She stated the reason for this was because she had thought the applicant was of good character however he had assaulted the sponsor to the point where she was taken to hospital and proceedings had now been taken by the police against the applicant. She claimed the applicant's brother had asked their family to pretend that they were still married and together so that the applicant can remain in the country. It was claimed the sponsor's family had declined to do this and the applicant's family had been acting in a threatening way to them.
14. The Department contacted the applicant by phone on 7 December 2016 to confirm his personal email address. The Department made several further attempts to confirm his contact details. The Department wrote to the applicant on 1 February 2017 requesting further information to show that the parties were in a genuine relationship. The authorised address to send this letter was the sponsor's email address. Despite attempts to do so, the Department were not able to contact the applicant directly. No response was received to this request for information.
15. The delegate who considered the application noted the following issues:
- No information had been provided as to the financial aspects of the relationship;
 - No information had been provided which would indicate the parties had been residing together in a shared home;
 - The statement from the sponsor's sister indicating she believed the relationship was genuine had now been withdrawn by her and no information had been provided of any social activities of the parties;
 - Despite the claims of the parties having spent time together since 2013, no information had been provided to substantiate this claim;
 - The applicant was given an opportunity to comment on information which indicated the sponsor had withdrawn her sponsorship of the application, however, no response was received; and

- The applicant had never provided to the Department the required Form 40SP Sponsorship of Application signed by the sponsor.
16. Taking into account these matters, the delegate was not satisfied the applicant was the spouse or de facto partner of the sponsoring partner as defined in s.5F and s.5CB of the Act. The applicant therefore did not meet the criteria in cl.820.211(2) and refused the application.

Information to the Tribunal

17. The applicant provided further information to the Tribunal including the following:
- Marriage certificate of the parties;
 - Statements by the parties as to aspects of their relationship;
 - Statements by friends and family in support of the application;
 - Photos of the parties together at various social events, including while on a holiday together to Bali;
 - Bank account details of the applicant and the sponsor; and
 - Joint residential tenancy agreement.
18. In the statement provided by the applicant, it was claimed that the sponsor was intoxicated when he collected her at 7:00pm to take her to a party. When they left that party she was further intoxicated and the applicant was angry with her as she had been talking to males at the party without his involvement. When driving home, with the applicant sister in the back seat, the sponsor became agitated and abusive and began to hit him. It was claimed the applicant “took a couple of swings to stop her from hitting (him) as (he) was driving. One of these swings hit Elizabeth in the mouth area.”
19. It was claimed after this incident the parties did not speak to each other for approximately two weeks until the sponsor contacted the applicant. It was claimed that this was their first big fight and was blown out of proportion. They again developed trust in each other and reconciled their relationship. It was claimed they were living together again in a genuine relationship.
20. Further documents were provided in support of the application. This included a Form 40SP sponsorship document signed by the sponsor, certificates of baptism of the parties dated 19 March 2017, statements by family members in support of the application, photos of the parties together, and various medical records.
21. The applicant appeared before the Tribunal on 11 September 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor and her mother and sister, Marjorie. The Tribunal hearing was conducted with the assistance of an interpreter in the Spanish and English languages. The applicant was represented by his registered migration agent who attended the hearing.
22. The applicant and the sponsor provided consistent information as to their current relationship. They provided information as to the work they do together, the arrangements in their household, their plans for the future and the relationships they have with their family members. They provided details of the steps they took to reconcile their relationship after the events in November 2016. The sponsor’s mother and sister gave evidence in support of the application. They both believed the relationship between the applicant and the sponsor was

genuine. They provided information as to the steps taken to reconcile the relationship after the events of November 2016.

23. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

24. The issue in the present case is whether the applicant is the spouse, as defined in s.5F of the Act, of the sponsoring partner.

Whether the parties are in a spouse or de facto relationship

25. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
26. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

27. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married on 22 January 2016. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects

28. Neither the applicant nor the sponsor have any significant assets of their own and it is not surprising, therefore, that they do not jointly own any assets or have any significant joint liabilities. They are renting their home in their joint names from the sister of the sponsor. The applicant has established a cleaning business and does sub-contract work. The sponsor works with him and draws an income from the business. The sponsor's income from the business is paid into her sole bank account as this makes it easier for tax purposes. The parties otherwise have two joint bank accounts (one of which is not used) and a business bank account for the applicant's business.
29. The parties share their expenses for their home from their shared income. They meet the day-to-day household expenses, including weekly shopping, from their shared income.

30. The Tribunal finds the financial aspects of the relationship support a finding that the parties are living together in a genuine continuing relationship with a mutual commitment to a shared life assessment and wife.

Household

31. The parties had been living together since they were married. There was a period of separation from November 2016 to May 2017 which is discussed below.
32. The parties work together as cleaners and spend almost all their time together. They share in the house work including the shopping and other domestic chores. The home in which they are currently residing is rented in their joint names from the sponsor's sister. Documents have been provided addressed to both the applicant and the sponsor at their shared residence.
33. The Tribunal finds that at the time of the application and at the time of this decision the parties were and are living together in a shared household. For periods of time, the parties had been living with the sponsor's mother. The arrangement within the household indicates the parties' relationship is genuine and continuing and they have a mutual commitment to a shared life as husband and wife to the exclusion of all others.

Social aspects

34. The parties provided extensive information as to their various social activities. Photos were provided from the time they first started their relationship to their current social activities together. This includes multiple family gatherings both in Australia and in Chile. Since the events in November 2016, the parties have joined a church and have been baptised in that church together. They have represented themselves as being married to each other to the other members of their congregation.
35. Statements have been provided by multiple members of their families attesting to the fact that the parties represent themselves as being married to each other and that their families recognise their relationship is genuine. The parties have plans to return together to Chile to be able to have a wedding ceremony there so that they can invite their friends and family members in Chile to attend that ceremony.

Commitment to each other

36. The parties first met each other in September 2013 and a relationship developed after that time. This included an extended period of time when the applicant had returned to Chile. The sponsor travelled to Chile to spend time with the applicant and his family there as well as the applicant meeting family members of the sponsor in Chile. The parties were married on 22 January 2016. They have now been married for over three years.
37. One of the most significant events in the relationship of the applicant and the sponsor was the fight the parties had in November 2016 and the repercussions that arose as a result of that fight. As a result of that incident, the parties separated and the sponsor contacted the Department to withdraw her sponsorship of the applicant.
38. The Tribunal accepts the evidence of the parties, and in particular the evidence of the sponsor's mother, that the events of that night were out of character of both the applicant and the sponsor and was a one-off event. Although the parties lived separately and apart for a period of time, they both wished to continue their relationship and took steps to reconcile the rupture that had taken place in their relationship. This involved not only gaining trust with each other but also with their extended family members.

39. They sought counselling through a church and have become more involved with the church activities. They were baptised together at that church on 19 March 2017. They sought assistance from their families as well as seeking their forgiveness. Their relationship has continued to develop.
40. The Tribunal places significant weight on the evidence of the sponsor's mother. Not surprisingly, she was particularly concerned as to the welfare of her daughter and any continuing relationship she had with the applicant. She denied that she had been threatened by the applicant or any members of his family at the time of the incident. She said that both the applicant and his brother tried to talk to her to explain what had happened from their perspective but she was so disturbed by the incident she did not wish to speak to them.
41. The sponsor's mother believes that the event in November 2016 was a one-off event and out of character. She believes that both the applicant and the sponsor have matured and developed since that time. She believes that their relationship is genuine and that the refusal of any visa would be detrimental to her daughter.
42. The Tribunal finds that the parties provide each other the degree of companionship and emotional support which would be expected in a genuine and continuing relationship and one where the parties have a mutual commitment to a shared life as husband and wife. The parties have plans for their future together and see their relationship as long-term.

Other considerations

43. The Tribunal has considered all the circumstances of the parties' relationship both individually and cumulatively. The Tribunal finds the weight of evidence supports a finding that at the time of the application the parties were in a genuine and continuing spousal relationship. The parties had a fight in November 2016 and as a result the parties separated with an AVO being taken out by the NSW Police on behalf of the applicant for her protection. The sponsor soon after the event did not wish this order to be made, however, the court still issued the order in December 2016 for the protection of the sponsor. Despite this, the sponsor and the applicant continued to communicate with each other and eventually reconciled their relationship. They commenced living together in May 2017.
44. Since that separation, the parties' relationship has grown. They now work together and are more intimately involved in each other's lives. They have established plans for their future together in Australia. The Tribunal finds that at the time of this decision the parties have a mutual commitment to a shared life as husband and wife to the exclusion of all others and are in a genuine and continuing relationship. The Tribunal finds that the parties live together.
45. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision.
46. The Tribunal finds the applicant meets cl.820.211(2)(a).
47. The delegate noted the applicant had not provided the Form 40SP Sponsorship document at the time of the application. That document has now been provided by the sponsor to the Tribunal.
48. The failure of the sponsor to have provided this document was explained as a result of the mental state of the sponsor who avoids dealing with issues due to trauma she suffered as a child. At the time the application was lodged, the applicant and the sponsor did not have any representation and were unaware of the importance of providing this document.

49. The fact that the sponsor wrote to the Department on 21 November 2016 after the fight she had with the applicant saying that she was withdrawing her sponsorship of the application indicates that at the time of the application she did sponsor the applicant. She has now provided the signed Form 40SP.
50. The Tribunal finds that at the time of the application the applicant was sponsored by his spouse who had turned 18 years of age. She continues to sponsor him at the time of this decision. The Tribunal finds the criteria in cl.820.211(2)(c) is met.
51. The applicant held a substantive visa at the time of the application and therefore the criteria in cl.820.211(2)(d) is not relevant.
52. For the above reasons, the Tribunal finds the applicant meets the time of application criteria in cl.820.211(2). As the applicant continues to meet this criteria of the time of this decision the applicant meets the criteria in cl.820.221.
53. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

54. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
 - cl.820.211(2) of Schedule 2 to the Regulations; and
 - cl.820.221 of Schedule 2 to the Regulations.

Hugh Sanderson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).